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No. 00-191

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,
Respondent.

On Petition For a Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the pennies per voter limit that 2 U.S.C. § 441a(d) imposes upon a political party's expenditure of so-called "hard money"—money raised in limited amounts from restricted sources and publicly reported—for party speech that is coordinated with the party's federal candidate violates the First Amendment to the United States Constitution.

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ARGUMENT

Respondent/appellee/cross-plaintiff Colorado Republican Federal Campaign Committee ("Colorado Party") joins the Federal Election Commission ("FEC") in urging this honorable Court to grant the Petition for a Writ of Certiorari, but for somewhat different reasons than those advanced by the Petition. The Colorado Party disagrees with the Petition's reasoning, its description of what the court of appeals held, and the issue presented for review.

I. The Petition For A Writ Of Certiorari Should Be Granted

Twenty-four years ago, this Court expressly reserved the question of the First Amendment constitutionality of the Party Expenditure Provision, 2 U.S.C. § 441a(d), in *Buckley v. Valeo*, 424 U.S. 1, 59 n.67 (1976). In 1996, when the Court first considered this case, it gave a partial answer, holding that the Party Expenditure Provision cannot constitutionally limit a political party's spending on speech that is independent of its candidate. The Court remanded for further development, however, the constitutionality of the Provision's limits on a party's "hard money" expenditures for speech that the party coordinates with its own candidates. Following additional discovery, extensive evidentiary submissions, and focused briefing, the district court and the court of appeals each wrote detailed opinions holding that the Provision is unconstitutional. Thus, the 24-year old question now is ripe for this Court's review.

A definitive ruling is needed. All political parties nationwide are subject to the Party Expenditure Provision, which limits their political communications. In papers filed with the court of appeals and the district court seeking a stay,[1] the FEC has reiterated that it will not accept the court of appeals' holding outside the Tenth Circuit. Indeed, the FEC intends to enforce the Provision retroactively within the Tenth Circuit if the ruling ever is reversed. FEC Statement (June 22, 2000) *at* http://www.fec.gov/pages/FECstatemtjune2000.htm. Thus, this Court's denial of review would present "a substantial risk

[1] On July 11, the court of appeals denied the FEC's Motion to Stay Mandate. The district court has yet to rule on the FEC's Motion for a Partial Stay Pending Appeal filed on June 23, 2000.

that application of the provision will lead to the suppression of speech." *NEA v. Finley*, 524 U.S. 569, 580 (1998).

II. The Question Presented Is Narrower Than Described in the Petition

A. This Case Concerns Hard Money, Not Soft Money

The issue presented for review is critically narrower than that suggested by the Petition for Certiorari. The Petition's Question Presented implies that the lower courts broadly and affirmatively established that parties can spend unlimited amounts from any sources in support of their candidates.

What the lower courts did was to strike down a particularly stringent limitation on the use of so-called "hard money"—that is, money raised in limited amounts from restricted sources and fully disclosed according to law. *E.g.*, App. 1a-18a (reported at 213 F.3d 1221); App. 1a-60a-61a (reported at 41 F. Supp. 2d 1197). As the district court found, most "hard money received by the parties is in the form of small (i.e., less than $100) contributions from individual contributors." App. 1a-64a.

The lower courts pointedly did not hold that political parties have a right to receive and spend so-called "soft money" that is raised in unlimited amounts from unrestricted sources. The court of appeals stressed that "we address only the constitutionality of § 441a(d)(3)'s limit on hard money coordinated expenditures." App. 1a-19a. The district court concurred: "While soft money may be received in unlimited amounts and from a multitude of sources, there is no suggestion in the evidence that such money is also used for coordinated expenditures." App. 1a-86a.

Whether and how soft money receipts and expenditures should be regulated is not at issue here. As the court of appeals stated, "We appreciate the FEC's concern over soft

money, but this proceeding does not present the opportunity for soft money reform." App. 1a-18a-19a. Likewise, the district court made clear that "[t]his case is not about the entirety of the campaign finance system." App. 1a -86a. This Court made a similar observation when it last addressed this case, noting that "[u]nregulated 'soft money' contributions may not be used to influence a federal campaign" and thus, "the opportunity for corruption posed by these greater opportunities for contributions [to parties] is, at best attenuated." App. 1a-102a (*Colorado I*, 518 U.S. at 616).[2]

B. This Case Concerns Burdens On The Unique Relationship Between Political Parties And Their Candidates

Contrary to the suggestion of the Petition (at 17-18), the lower courts did not hold that political parties have a First Amendment right to engage in more speech than others. Instead, the lower courts recognized that political parties have a special interdependent relationship with their own candidates (who themselves have no spending limits, *Buckley*, 424 U.S. at 51-54), sharing a common purpose and committed to mutual expression and association. *E.g.*, App. 1a-20a-21a; App. 1a-80a-83a, 87a-88a. As Justice Kennedy (joined by Chief Justice Rehnquist and Justice Scalia) explained in this case:

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[2] According to the FEC's own June 23, 2000 press release (at http://www.fec.gov/press/ptymy99a.htm), the national Republican and Democratic Parties have raised $179.3 million and $104 million respectively in hard money for the first 15 months of fundraising (January 1999 through March 2000), which is a decrease of $2.1 million for the Republicans and an increase of $.8 million for the Democrats when compared to the funds raised during the same period in 1995-96. By contrast, the Republicans raised $86.4 million, a 93% increase, and the Democrats raised $80.2 million, a 102% increase, in soft money. *Id.*

> A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; *but in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa.*

App. 1a-117a (518 U.S. at 629) (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added). More recently, the Court stated, "Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'" *California Democratic Party v. Jones*, 120 S. Ct. 2402, 2408 (2000).

Thus, it is a uniquely severe burden to require political parties to separate themselves from their candidates as a condition of engaging in political speech during an election. The lower courts held that, particularly in light of the multiple legal restrictions imposed on parties with respect to raising and reporting hard money contributions, the severe burden on a party's political speech imposed by the Party Expenditure Provision was not justified.

C. This Case Concerns A Limit On Political Speech, Not A Restriction On Monetary Contributions To A Candidate

The Petition for Certiorari (at 14) mistakenly suggests that the lower courts held that political parties are free to engage in spending that is "functionally and constitutionally indistinguishable from direct contributions to candidates." Contradicting its later claim, the Petition concedes (at 4), that the Party Expenditure Provision does not regulate a party's "transfer of funds to the candidate herself." In fact, the Provision limits party communications not mere money transfers.

The undisputed record shows that political parties have their own messages to disseminate and that 90% of the spending that is curtailed by the Provision historically has been devoted to advertising and mail, i.e. pure speech. *See* App. 1a-83a ("Thus, unlike contributions, communications via coordinated party expenditures implicate core First Amendment rights."). For example, a political party might wish to send each registered voter of the state a letter introducing the party's candidate and explaining how electing that candidate will advance the party's objectives. Under the pennies per voter limit imposed by the Party Expenditure Provision, the Colorado Party could not send such a letter if coordinated with its candidate.[3]

The Petition (at 14) inaccurately portrays a political party as a "simple expedient" for candidate bill paying. Based on the extensive record, the lower courts rejected that view, declining to reduce parties to the political equivalent of a potted plant that contributors and candidates use or ignore as seems expedient. The unique role of the modern political party in our democracy was conceded by all of the experts, including the FEC's, who testified in this case. Accordingly, the lower courts found that political parties play a vital and legitimate role in our political process and in political debate. *E.g.*, App. 1a-13a ("From the birth of this republic into the 21st century, political parties have provided the principal forum for political speech and the principal means of political association.").

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[3] In a March 1 press release, *FEC Announces 2000 Party Spending Limits* (at http://www.fec.gov/press/441ad2000.htm), the FEC announced the coordinated expenditure limits to be less than seven cents per potential voter. The spending limit formula is two cents multiplied by the state's voting age population, adjusted for inflation.

D. The Party Expenditure Provision Was Enacted To Reduce Campaign Spending; Not To Prevent Corruption

The Petition contends (at 18) that Congress judged hard money spending by political parties to be a source of corruption. This assertion is unfounded. Nothing in the legislative history of the Party Expenditure Provision reflects any such congressional concern. Instead, as this Court already noted, "Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." App. 1a-104a (518 U.S. at 618); *see also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41 (1981) (Party Expenditure Provision was intended to "assur[e] that political parties will continue to have an important role in federal elections.").

Indeed, the Colorado Party's brief on the merits—should review be granted—will argue that modern political parties are an important mechanism for openness and accountability. By limiting the ability of parties to use hard money to fund coordinated speech, the Party Expenditure Provision perversely drives parties toward less desirable, less regulated soft money activities. At the same time, the Provision reduces the vitality of political competition by muffling a voice that is unique in its support for challengers and non-incumbent candidates. *See* App. 1a-66a. Striking the Provision and allowing parties discretion to spend disclosed and limited hard money will reduce the role of "large" soft money contributors and alleviate the "corruption" concerns voiced by the FEC. Far from undermining federal campaign regulation, as the Petition claims (at 14), striking the Provision will strengthen the campaign system.

E. The Issue Here Is Very Different From That Presented By *Nixon v. Shrink Missouri Government.*

The Petition repeatedly cites *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), as if it concerned the issue presented here. In fact, as the court of appeals recognized, that case concerned the type of general contribution limit that was sustained long ago in *Buckley*. App. 1a-15a & n. 9.

The contribution limit sustained in *Shrink Missouri Government* did not impose a burden on the unique relationship between a political party and its candidate comparable to that imposed by the Provision. Nor was the limit shown to uniquely burden a political party's own political speech, as occurs under the Provision. And the Missouri limit was enacted for the precise purpose of preventing corruption, not for the purpose of reducing the level of spending that led to the Party Expenditure Provision.

Buckley, 424 U.S. at 59 n.67, and *Colorado I*, App. 1a-101a-102a, 109a-112a (518 U.S. at 616-17, 622-25) recognized that a party spending limit affects parties in unique ways which First Amendment analysis must take into account. *Shrink Missouri Government* did not call for and did not involve such analysis.

CONCLUSION

In sum, this case presents an important issue that is ripe for review and that this Court first reserved 24 years ago. The question presented is whether the Party Expenditure Provision, which limits coordinated spending of hard money by political parties to just pennies per voter, violates the First Amendment. For the reasons discussed above, the lower courts correctly concluded that the Provision is invalid. This Court should review and affirm those rulings on a nationwide

basis. The Colorado Party urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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